

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-218234.2 **DATE:** March 27, 1985
MATTER OF: Santa Fe Corporation

DIGEST:

A dismissal with prejudice by a court constitutes a final adjudication on the merits of a complaint which is conclusive not only as to matters which were decided, but also as to all matters that might have been decided. Therefore, GAO will not consider a protest involving issues which were or could have been raised in the court action.

Santa Fe Corporation protests the award of a contract to Allied Defense Industries (ADI) by the Department of the Navy under solicitation No. N00033-84-R-0110, a small business set-aside for hull roughness surveys and analyses. We dismiss the protest.

Santa Fe originally protested to GAO against the award to ADI on September 20, 1984. Santa Fe alleged that the award was improper because Santa Fe's offer was more advantageous to the government, cost and other factors considered, and because a former Santa Fe employee participated in the evaluation process. Subsequently, another disappointed offeror, NKF Engineering Associates, Inc., protested to the agency that ADI was not an eligible small business concern for purposes of the solicitation. The agency and Santa Fe then agreed to suspend action on Santa Fe's protest until the Small Business Administration (SBA) issued a final ruling on ADI's size status. We therefore closed our file on Santa Fe's protest subject to reopening if the SBA found ADI qualified as a small business.

On February 11, 1985, the SBA Office of Hearings and Appeals found ADI qualified as a small business for purposes of the solicitation. On February 19, 1985, Santa Fe and NKF filed suit in the United States District Court for the District of Columbia (Civil Action No. 85-0599) seeking a temporary restraining order and a preliminary

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and a permanent injunction to prevent the Navy from implementing the award to ADI. The grounds for the suit were that ADI is not eligible as a small business concern because of its affiliation with a foreign firm, that the award to ADI is precluded by the conflict of interest provision in the solicitation and that several contract provisions are rendered unenforceable by ADI's affiliation with the foreign corporation.

The court dismissed Santa Fe and NKF's complaint with prejudice, concluding that the plaintiffs had "utterly failed to show any wrongful act" by the defendants. Santa Fe then filed this protest with our Office. In the protest, Santa Fe raises the same issues presented in its suit as well as the issues contained in its original protest.

A dismissal with prejudice by a court constitutes a final adjudication on the merits and bars further action by this Office. Cecile Industries, Inc., B-211475.4, Sept. 23, 1983, 83-2 CPD ¶ 367; see Fed. R. Civ. P. 41(b). Further, the effect of such a judgment extends not only to matters which were decided, but also to all matters that might have been decided. See Frontier Science Associates, Inc.--Reconsideration, B-192654, Dec. 26, 1978, 78-2 CPD ¶ 433; Perth Amboy Drydock Co., B-184379, Nov. 14, 1975, 75-2 CPD ¶ 307. Although Santa Fe's protest presents two issues which were not expressly raised in its suit,^{1/} those issues clearly could have been raised in the court action. Therefore, we consider the court's dismissal of the protester's complaint as a full adjudication on the merits of the issues presented by its protest, and we will not consider them further.

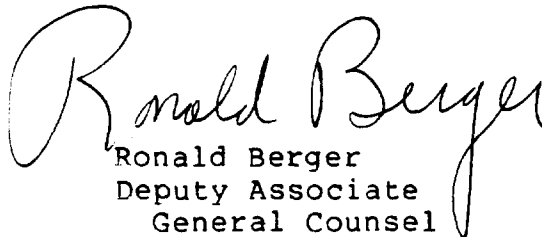
Santa Fe's protest is dismissed.

NKF has filed comments on Santa Fe's protest in which it alleges that the solicitation should have provided for the evaluation of estimated travel and per diem costs. NKF argues that these costs should have been considered because

^{1/} The two additional issues are that Santa Fe's offer was more advantageous to the government and that the participation of Santa Fe's former employee in the evaluation process was improper.

there are significant savings inherent in an award to a firm whose technical personnel are located in the United States rather than in a foreign country. NKF also contends that the agency engaged in improper discussion with ADI prior to the submission of best and final offers.

We will not consider NKF's contentions. NKF joined in Santa Fe's lawsuit and these issues could have been raised there. Therefore, our consideration of NKF's latest allegations would not be proper, in view of the court's dismissal of the suit with prejudice. Further, we note that contract award was made to ADI in September of 1984, but NKF did not raise these concerns until March of 1985. Accordingly, they appear to be untimely under section 21.2(a) of our Bid Protest Regulations. 49 Fed. Reg. 49,417, 49,420 (1984) (to be codified at 4 C.F.R. Part 21).


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